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**IN THE
SUPREME COURT
OF THE UNITED STATES**

October Term, 1968

No. ~~*~~ 24**

JOSEPH WALLER, JR.,

Petitioner,

—vs—

THE STATE OF FLORIDA,

Respondent.

**Response to Petition for a Writ of Certiorari
to the District Court of Appeal, Second District,
State of Florida**

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IN THE
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October Term, 1968

No. 846

JOSEPH WALLER, JR.,

Petitioner,

—vs—

THE STATE OF FLORIDA,

Respondent.

**Response to Petition for a Writ of Certiorari
to the District Court of Appeal, Second District,
State of Florida**

PRELIMINARY STATEMENT

The petition for writ of certiorari supports the allegations of facts by references to those court opinions found in its appendix. The state presents in its response the pertinent Florida Statutes and a reproduction of that portion of the record on appeal to the District Court of Appeal of Florida, Second District, which contains the pertinent ordinances of the city of St. Petersburg, Florida, on which petitioner was convicted in municipal court.

OPINION BELOW

Respondent concedes that the pertinent opinion herein sought to be reviewed is reported at 213 So.2d 623, and that such opinion is accurately depicted in the appendix of petitioner's petition.

JURISDICTION

Respondent concedes that appropriate jurisdiction to entertain this proceeding is vested in this court pursuant to 28 U.S.C. 1257.

STATEMENT OF THE CASE

Respondent accepts petitioner's statement of the case.

QUESTIONS PRESENTED

The following questions will parallel the issues raised by their corresponding numbers in the petition for writ of certiorari.

1. WHETHER SUCCESSIVE MUNICIPAL AND STATE PROSECUTIONS OF THE SAME DEFENDANT ARISING OUT OF THE SAME CONDUCT BUT NOT FOR THE SAME CRIME VIOLATE THE RULE AGAINST DOUBLE JEOPARDY AND THEREBY VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.
2. WHETHER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRES THE STATES TO MAKE AVAILABLE THE PRESENCE INVESTIGATION REPORT WHICH WAS CONSIDERED BY THE TRIAL JUDGE BEFORE SENTENCING.

REASONS FOR DENYING THE WRIT

1. SUCCESSIVE MUNICIPAL AND STATE PROSECUTIONS OF THE SAME DEFENDANT ARISING OUT OF THE SAME CONDUCT BUT NOT FOR THE SAME CRIME DO NOT VIOLATE THE RULE AGAINST DOUBLE JEOPARDY AND THEREBY VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The facts of this case do not present a double jeopardy question. Clearly the facts of this case do not require this tribunal to reach the question of whether the double jeopardy clause of the Fifth Amendment is applicable to the states through the due process clause of the Fourteenth Amendment. Petitioner says on page 3 of the petition that the grand larceny charge arose out of the same conduct which gave rise to the municipal charges. Again, in the statement of the first question, petitioner alludes to the same conduct. Nowhere does petitioner allege that the state charge was the same as charges on which petitioner was tried in municipal court. The municipal ordinances clearly do not encompass and are not lesser included offenses of the Florida larceny statute (Appendix, *infra*, pages 1a-2a). Had petitioner been charged in the state court under Section 822.03, Florida Statutes, and Section 877.03, Florida Statutes, which encompass the same crimes as those charged in the municipal court, then the double jeopardy question would be before this court (Appendix, *infra*, page 2a). The larceny statute in Florida requires that the taking be with the intent to deprive or defraud the true owner of the property or of the use and the benefit thereof (Appendix, *infra*, page 2a). This element is lacking in the destruction of city property and breach of the peace ordinances.

Petitioner could have been prosecuted originally in state court for grand larceny, breach of the peace, and injuring a public building. Because petitioner was prosecuted on the latter two in municipal court surely does not invoke a double jeopardy question.

In *Cichos v. Indiana*, 385 U.S. 76, it was conceded that both crimes required identical proof to sustain a conviction under Indiana law. Such is not the situation in the present case.

Surely the states and their subdivisions are not prohibited from punishing conduct which results in commission of different crimes especially where the state and municipal trials are for different crimes.

2. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT DOES NOT REQUIRE THE STATES TO MAKE AVAILABLE THE PRESENTENCE INVESTIGATION REPORT WHICH WAS CONSIDERED BY THE TRIAL JUDGE BEFORE SENTENCING.

Petitioner concedes that the court was following the Florida law as set forth in *Morgan v. State*, Fla. App. 1962, 142 So.2d 308, in affirming the denial of the motion for discovery of the presentence investigation report. The same interpretation has been followed by the Florida courts up to the present (*Martino v. State*, Fla. App. 1968, 215 So.2d 495).

A proper analogy cannot be made between the federal sentencing procedure and that of the State of Florida. Federal Rules of Criminal Procedure, Rule 32(c) lodges in the trial judge the discretion to disclose all or a part of the presentence investigation report and

further affords the defendant or his counsel the right to comment on the contents. No such discretion is available to the trial courts in the State of Florida.

The question presented here is not whether the state should make presentence investigation reports available but whether the holding that such report is confidential is prohibited by the Constitution of the United States. Petitioner has presented a long array of authorities favoring disclosure. Other authorities oppose, with equal vigor, the disclosure of the contents of presentence investigation reports.¹

Respondent recognizes that some jurisdictions give the defendant the right of access to the presentence report. However, this issue should be decided on strict constitutional guide lines. A similar attack has been made on the prosecution by information not preceded by an indictment or a probable cause hearing. As desirable as some may urge that the federal practice of charging by grand jury indictment is, there is no federal constitutional impediment to dispensing entirely with the grand jury system in state proceedings (*Beck v. Washington*, 369 U.S. 541; *Hurtado v. California*, 110 U.S. 516).

¹For arguments opposing disclosure, see Barnett and Gronewold, Confidentiality of the Presentence Report, 26 Fed. Prob. March 1962, p. 26; Judicial Conference Committee on Administration of the Probation System, Judicial Opinion on Proposed Change in Rule 32(c) of the Federal Rules of Criminal Procedure—a Survey (1964); Keve, the Probation Officer Investigates, 6-15 (1960); Parsons, The Presentence Investigation Report Must be Preserved as a Confidential Document, 28 Fed. Prob. March 1964, p. 3; Sharp, the Confidential Nature of Presentence Reports, 5 Cath. U.L. Rev. 127 (1955); Wilson, A New Arena is Emerging to Test the Confidentiality of Presentence Reports, 25 Fed. Prob. Dec. 1961, p. 6; Federal Judge's Views on Probation Practices, 24 Fed. Prob. March 1960, p. 10.

It appears that the rationale of this Court's opinion in *Specht v. Patterson*, 386 U.S. 605, was that the Colorado criminal procedure concerning the invocation of the Sex Offenders' Act had the effect of making a new charge leading to punishment. Respondent agrees that under these circumstances, it could not be seriously questioned that the failure to grant a hearing and the right of confrontation violates the due process clause of the Fourteenth Amendment. The issue reached in *Kent v. United States*, 383 U.S. 541, was the question of the procedural safeguards that must be afforded a juvenile in a binding over procedure by the juvenile court. In *Townsend v. Burke*, 334 U.S. 736, the lack of due process arose from the failure of the defendant to be represented by counsel at the sentencing.

It may well be that the State of Florida, through its newly-apportioned legislature, may see fit to follow the trend in this area. It is submitted, however, that this fact is no reason for saying that the due process clause of the Fourteenth Amendment, concerning the defendant's right to a fair trial, confrontation of witnesses, and assistance of counsel, applies to the specific issue of revealing the contents of presentence investigation reports.

CONCLUSION

It is concluded that not only was there no violation of the jeopardy provision, or the due process clause of the Fourteenth Amendment, but that in fact the issues raised by the petition for writ of certiorari did not lie within the broad scope of reversible error.

WHEREFORE, this Court is respectfully requested to deny the petition for writ of certiorari.

Respectfully submitted,

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